

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 275 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

AYUBKHAN TURABKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 275 of 1997
MR EE SAIYED for Petitioner No. 1
MR PRACHHAK APP for Respondent No. 1
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CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 19/04/2004

#. The appellant-accused-Ayubkhan Turabkhan Pathan has filed this appeal and challenged the impugned judgment and order of conviction and sentence dated 28.2.1997 passed by the learned Addl. Sessions Judge, Valsad at Navsari in Sessions Case No.52/96 convicting the appellant-accused for the offence u/S.302 IPC and sentenced him to suffer life imprisonment and to pay fine of Rs.200/=, in default, to further undergo SI for 15 days.

#. This appeal was admitted on 22.9.1997 by the Division Bench of this Court, but bail was refused. Jail record of the appellant-accused produced by learned APP, Mr.Prachhak shows that he has remained in jail as under-trial prisoner for a period of 1 year 1 month and 44 days and actually undergone the sentence after conviction for a period of 8 years 2 months and 42 days. He has also earned remission of 2 years.

#. Learned counsel Mr.Saiyed for the appellant-accused vehemently submitted that the learned Judge committed grave error in convicting the appellant-accused for the offence u/s.302 IPC. He submitted that this case is based purely on circumstantial evidence and there is no eye witness to the incident, therefore, the learned Trial Judge should not have convicted the accused for the major offence u/s.302 IPC when the link of circumstantial evidence was not fully established by the prosecution.

#. Mr.Saiyed in support of his aforesaid submission brought to our notice the evidence of complainant-Mariambibi. Mariambibi PW-2 EX.11 stated in her evidence before the court that her daughter-Suraiya got married with accused-Ayubkhan prior to 8 years of the incident. Out of their wedlock they had one son and one daughter. They were always quarrelling with each other. On the date of incident i.e. on 14.12.1995 Ayubkhan came at 12.30 p.m. from his work and had lunch. Thereafter, deceased and accused quarrelled. Thereupon, accused started beating her daughter. That time she was present there. Thereafter, accused sent her for bringing mutton. She went at 3.00 p.m. and when she returned at 3.30 p.m., at that time, front door of the house was closed and she saw accused running away from the back side of the house. She saw her daughter Suraiya lying on the ground with number of blows received by her on her person. Suraiya was dead. She sent son of her sister to Surkhai to call his brother Naimkhan. Thereafter, she

had gone to Chikli Police Station where her brother lodged complaint. It was read over to her. Police took her thumb impression on the complaint, which is at Ex.12. In her cross-examination, she stated that she was not staying with the accused, but as her husband had gone to his native for 4 days, she came to stay at the house of the accused, who was a banana vendor. On the day of incident, she had gone to bring mutton at 3.00 p.m. and returned at 3.30 p.m. The accused had taken meal at about 1.30 p.m. After the accused beaten her daughter she died. In her presence accused used to beat her by hand and chappals.

#. From the above evidence of Mariambibi, Mr.Saiyed submitted that complaint at Ex.16 was not lodged by this complainant, but she had merely put her thumb impression. Therefore, it cannot be said to be a complaint. It is true that she has stated in her chief-examination that her brother had lodged the complaint, but it seems that there was some misunderstanding on her part, therefore, she has stated so. In fact, the complaint was lodged by Mariambibi, which is clear from the evidence of her brother Aliarakha PW-5 Ex.16 and Naimkhan PW-4 Ex.15. Aliarakha, clearly stated in his evidence in chief that Mariambibi has lodged complaint in his presence. It is no doubt true that he had not stated so in his statement before the police. But it is very much clear from the evidence of Naimkhan PW-4 Ex.15 that in his presence Aliarakha lodged complaint and there is no cross-examination on this point.

#. Mr.Saiyed then submitted that Mariambibi could not have seen the accused running away from the place of incident when she stated so in her chief-examination. Surprisingly, there is no cross on this point. From the evidence of this witness-Mariambibi, it is clear that she was staying with her daughter and son-in-law, present appellant-accused since last 2 to 4 days. It is amply proved that she was sent by the accused to bring mutton at 3.00 p.m. and when she returned with mutton at 3.30 p.m. Prior to that also there was a quarrel between the accused and her daughter. At that time also the accused had beaten her. When she returned home she saw the accused running away from his house and found her daughter lying dead in the backward of the house. Thereupon, she had called Naimkhan, her sister's son, to call her brother Aliarakha from Surkhai, which was at a distance of about 13 kms. from the place of incident. After Aliarakha came with Naimkhan all three had gone to the police station and lodged complaint against the accused for the offence u/s.302 IPC for committing murder

of Suraiya. The complaint was lodged at the earliest point of time i.e. at 7.00 p.m. i.e. just within three and half hours of the incident. Her evidence is duly corroborated by the evidence of Naimkhan and Aliarakha. Thus, it is clear from the evidence of these three witnesses that the deceased and accused were last seen together at the house of the accused by Mariambibi and when she returned home she found her daughter dead and the accused running away from the place of incident. The muddamal weapon i.e. "chhura" was discovered from his house having blood stains on it. On the night of that incident, the accused presented himself before Rander Police Station and confessed about his guilt before the P.S.O., Dalabhai Bariya. He sent a message to Chikli Police Station and P.S.I., Mr.Joshi came from Chikli and took the accused with him. It is true that P.S.I., Mr.Joshi had not recorded his statement, therefore, we would not like to rely upon the extra-judicial confession made before this P.S.O., Dalabhai Baria. But, the fact of the accused-Ayubkhan producing himself before Rander Police Station at Surat from where P.S.I. taking away him is duly established. Under the circumstances, it cannot be said that the learned Trial Judge committed any breach or error in convicting the appellant-accused for the offences u/S.302 IPC.

#. However, Mr.Saiyed submitted that the accused cannot be convicted for the offence punishable u/S.302 IPC and he should be convicted only for the offence u/S.304 Part-I IPC. According to Mr.Saiyed, admittedly, there was quarrel between the husband and wife prior to the incident, as stated by Mariambibi before the court, therefore, once again quarrel must have taken place between the accused and his wife and because of grave and sudden provocation, the accused must have assaulted his wife and because of that she must have died. There is no evidence to that effect. The way and manner in which the appellant-accused assaulted his wife and gave as many as 13 blows shows that he had clear intention to kill his wife and there was no sudden and grave provocation. The conduct of the accused sending his mother-in-law outside the house immediately after the first quarrel fully establish that he never wanted any person to witness the incident. Therefore, he had sent his mother-in-law on the excuse of bringing mutton, but she returned early and saw the accused running away from the place of incident after assailing Suraiya. Therefore, there is no substance or merit in the submission of Mr.Saiyed that the appellant-accused could have been convicted for the lesser offence punishable u/S.304 part-I IPC.

In view of the above discussion, this appeal fails and is hereby dismissed.

(B.J.Shethna, J.)

(J.R.Vora, J.)

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